EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2020/4 Admissibility of Employers' Requirements regarding Religious Symbols in Workplace (GE)

Many national decisions in Germany in the past had to deal with employers' requirements regarding religious symbols in the workplace. Also, in 2017, the ECJ has dealt with two matters of such. Whilst the ECJ strictly refers to the principles of entrepreneurial freedom, the Federal Labour Court (Bundesarbeitsgericht, the 'BAG') tends to give priority to religious freedom. Last year, the BAG appealed to the ECJ for final clarification, in particular regarding the relationship between the basic rights of entrepreneurs and the constitutional right to religious freedom, by way of a preliminary ruling procedure with its decision dated 30 January 2019.

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Summary

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Background

The prohibition of indirect discrimination at work according to Article 2(2)(b) of Council Directive 2000/78/EC was implemented in Germany by means of the General Act of Equal Treatment (Allgemeines Gleichbehandlungsgesetz, 'AGG'). Therefore, the interpretation of the Directive is decisive to the proper interpretation of national rules. Furthermore, the EU Charter of Fundamental Rights as well as the Convention for the Protection of Human Rights and Fundamental Freedoms must be taken into account when implementing Union law on a national level. Article 10(1) of the Charter and Article 9 of the Convention – both protecting religious freedom – must be observed in matters relating to discrimination on religious grounds. At a national level, the constitutional right to religious freedom under Article 4(1) and (2) of the German Constitution (Grundgesetz, 'GG') may influence this decision as well.

Indirect discrimination within the meaning of Article 2(2)(b) of the Directive and Section 3(2) of the AGG exists if an (apparently) neutral provision leads to circumstances disadvantaging one person compared to other persons. Such discrimination may be justified by legitimate aims; respective criteria and procedures need to be appropriate and necessary. A legitimate aim with regard to the prohibition of religious statements at work may be the employers' desire for company neutrality.

Facts

In the case at hand a Muslim woman was employed as a cashier. The employer operated several retail branches throughout Germany. It introduced a clothing regulation prohibiting the wearing of any headgear at work and, since July 2016, the wearing of conspicuous, large-scale religious, political or other ideological symbols. After returning from parental leave the employee wore a headscarf for religious reasons. The employer prohibited the wearing of any headgear and stated that the regulation in question was necessary in order to comply with the policy of neutrality in its company. It also stated that those measures comply with the related ECJ's jurisdiction principles. The ECJ had ruled in its judgments of 2017 that the wearing of religious symbols may be prohibited if the company wants to achieve the aim of company neutrality and if the prohibition applies to all religious beliefs and ideologies without any distinction.

In contrast, the employee considered her religious freedom was being violated.

The two lower instance courts confirmed the employee's arguments. Unlike the cases decided by the ECJ, the employee did not assume a representative function in the company. Such representative function was, inter alia, a relevant criterion for the ECJ's decision. Rather, it is common that Muslim women wear headgear, either on the seller's or on the buyer's side.

Judgment

The BAG held that a decision in this matter required the clarification of questions on the interpretation of Directive 2000/78/EC and the relationship between primary Union law and national constitutional law. The BAG referred to the ECJ for a preliminary ruling concerning several questions.

First, the BAG asked the ECJ whether an indirect unequal treatment on grounds of religion by an internal company regulation may be appropriate if the wearing of any visible and large-scale symbols of religious, political and other ideological convictions is prohibited. The BAG considers this company regulation an indirect discrimination as employees of agnostic conviction tend to be less likely to wear visible symbols. With regard to the ECJ's decisions in the matters of Achbita – v – G4S Secure Solutions (C-157/15) and Bougnaoui and ADDH – v – Micropole SA (C-188/15), it does not seem clear if these require general prohibitions or apply to partial prohibitions concerning large-scale symbols as well.

The second and third questions relate to company regulations containing appropriate and necessary provisions within the meaning of Article 2(2)(b)(i) of the Directive. If the limited prohibition is justified by a legitimate aim, the means of company regulation need to be appropriate and necessary. The Senate has asked whether the freedom of thought, conscience and religion (Article 10 of the Charter of Fundament Rights) and freedom to conduct a business (Article 16) may be regarded in balancing interests. In case the rights from the Charter may already be taken into account during the general examination, the Senate considers that the religious freedom prevails. The Senate has asked the same question in regard to the constitutional right of religious freedom within Article 4(1) and (2) of the German Constitution.

In a final question, the Senate has sought clarification of the relationship between European Union law and national constitutional law. If neither the rights of the Charter nor the constitutional rights may be taken into account, the question arises whether national constitutional rights are excluded in totality. In the present case, entrepreneurial freedom within the meaning of Article 16 of the Charter may be considered accordingly, if consistent with the reservations of national laws and practices. The ECJ has denied this with regard to an identically formulated reservation in Article 27 of the Charter. It seems obvious to apply these principles in Article 16 of the Charter. If Article 4(1) and (2) of the German Constitution are applicable, religious freedom prevails – otherwise, the appeal of the employee is to be rejected.

Commentary

Over the past few years, the importance of the legal framework of prohibitions regarding the wearing of religious symbols has increased significantly. Many employers will have to deal with questions regarding this issue in the future. Employers need to respect the needs of society and its employees in order to ensure acceptance and tolerance, while retaining the possibility to act neutrally.

With its decisions the ECJ has provided evident support to entrepreneurial freedom so far. If this approach is maintained, requirements to behave neutrally in connection to workplaces are probably sufficient to prevent the wearing of signs of religious expression. On the other hand, European law just provides a minimum level of protection to prevent discrimination. This is why the ECJ could also consider a stronger national protection of religious freedom. .

In any case the ECJ's decision probably will provide employers with clear indications and criteria with respect to neutrality requirements. On this basis, employers will be able to pass company regulations which are legally safe. It is assumed that the ECJ's decision will be issued in the summer of 2020. The case number (C-341/19) has been assigned but, so far, there have not been any developments in the case yet.

Comments from other jurisdictions

Austria (Dr. Karolin Andréewitch and Dr. Jana Eichmeyer, Eisenberger & Herzog Rechtsanwalts GmbH):

The prohibition of discrimination in the workplace on religious grounds was implemented in Section 16 et seq. of the Austrian Equal Treatment Act.

In Austria, the Supreme Court dealt with the Islamic headscarf, abaya (the Islamic overgarment) and niqab (the Islamic face veil) in a ruling of 2016. The prohibition of wearing the niqab for a Muslim notary's office employee was not considered direct discrimination on the grounds of religion by the Supreme Court, as it could be justified for reasons of communication and interaction with clients, colleagues and the employer. Further, the prohibition was also not considered indirect discrimination on the grounds of gender aspects. However, the Supreme Court found the restriction of the notary employees' activities due to wearing a headscarf and an abaya to be direct discrimination. As the decision refers to an individual prohibition, respectively instruction by the employer and is limited to the aspect of a dress code, it is not entirely comparable with the German case at hand. In such a case which concerns a general policy of neutrality affecting all employees (including religious, ideological and political convictions), it remains to be seen whether the Austrian Supreme Court would follow the ECJ and give preference to entrepreneurial freedom. In our view this is quite

doubtful – at least to the extent advocated by the ECJ.

Belgium (Gautier Busschaert, Van Olmen & Wynant):

The question of whether an employee can show signs of a political, philosophical or religious belief at work, e.g. a Muslim woman wearing a headscarf, has received a lot of attention in Belgium over the past few years. Before the cases of Achbita (C-157/15) and Bougnaoui (C-188/15), the majority of Belgian courts had already seemed to accept that the prohibition of wearing any religious, philosophical or ideological signs such as headscarves, would not constitute indirect discrimination, so long as the prohibition can be objectively justified by a legitimate aim such as the pursuit of a neutrality policy.

Over the past few years, Belgian companies have acted in accordance with this European case law and have adopted more and more company policies in line with the principles set out by the European Court of Justice in Achbita.

The most recent Belgian case on this topic (Labour Court of Liege (first instance), 20 February 2019) follows the same reasoning as the case of Achbita. By applying the same principles put forward by the ECJ, the Labour Court decided that a company's general prohibition for employees who were in contact with clients to show visible signs of a political, philosophical or religious belief, was justified by a legitimate aim (neutrality) that was necessary and appropriate to that aim. Hence the Court decided that there was no discrimination (direct or indirect).

The preliminary question by the German Federal Labour Court will hopefully lead to an even more defined framework that will allow companies to act with more legal certainty. Based on the Eweida case of the European Court of Human Rights of 27 May 2013, one could argue that the size of the religious sign should be taken into account when devising a neutrality policy in accordance with the proportionality principle. In this case, the ECtHR had dismissed a neutrality policy set up by British Airways in particular because it prohibited Ms Eweida from wearing a cross which was discreet and could not have detracted from her professional appearance (para. 94). Similarly, in the Advocate General Kokott's Opinion in the Achbita case, the size and conspicuousness of the religious symbol as well as the nature of the employee's activity were proposed as factors to be taken into consideration when assessing the proportionality of a neutrality policy.

In Achbita, the ECJ did not give concrete guidance as to how to assess proportionality. It might be forced to do so now with this new preliminary question on large size religious items.

United Kingdom (Richard Lister, Lewis Silkin LLP):

It is useful to know that the ECJ will in this case have a further opportunity to address the sensitive issue of employees wearing religious attire or symbols in the workplace, following its previous judgments in Achbita and Bougnaoui.

Cases of this type in the UK are also normally regarded as raising issues of indirect religious discrimination (which is consistent with the EJC's ruling in Achbita, in particular). That clearly seems the correct approach to a 'no headgear at work' rule, which is neutral and not directed at a particular group, but it will be interesting to see what approach the ECJ takes in responding to the BAG's question regarding the prohibition of 'visible and large-scale' symbols.

The key issue in most cases of this kind in the UK is currently justification – whether the employer had a legitimate aim and whether its policy was proportionate. Tribunals and courts generally look for a compelling justification for indirectly discriminatory prohibitions and are unlikely to accept arguments based solely on the employer's 'entrepreneurial freedom'. In one case, for example, it was found to be unlawful indirect discrimination to require a hair stylist to remove her headscarf so that her hair was on show to customers.

I hope Caroline is right is predicting that the ECJ's forthcoming judgment will probably provide clearer guidance with respect to broad 'neutrality' requirements and the circumstances in which they can be justified. As reported previously in EELC, there is considerable uncertainty surrounding this issue in France, and specifically the extent to which rules that prohibit the wearing of religious clothing or symbols should be restricted to employees in direct contact with customers.

Subject: Religious Discrimination

Parties: MJ – v – MH Müller Handels GmbH

Court: Bundesarbeitsgericht (Federal Labour Court)

Date: 30 January 2019

Case number: 10 AZR 299/18; C-341/19

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Judgment: https://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=en&Datum=2019-1-30&nr=22338&pos=1&anz=9.
Request for a preliminary ruling: https://curia.europa.eu/juris/showPdf.jsf?text=&docid=220024&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4090498.

Creator: Bundesarbeitsgericht (Federal Labour Court)
Verdict at: 2019-01-30
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